Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WATERGATE AT LANDMARK CONDOMINIUM,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Happ

QUESTION PRESENTED

In *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), this Court decided by plurality opinion that liability could be established in an employment discrimination case if the discriminating conduct was found to play a critical part in the decisionmaking process of the employment action under review. Here, the Equal Employment Opportunity Commission conceded, and the Court of Appeals assumed, that the persons making the alleged age-related statements were not the ultimate decisionmakers and that the age-related statements were not communicated to the ultimate decisionmakers. The Court of Appeals, nevertheless, affirmed an award because the persons making the statements were deemed to be limited agents of the employer. The question presented is:

Whether damages can be awarded under the Age Discrimination in Employment Act of 1967, when the judgment is based on alleged discriminatory statements of persons who are limited agents of the employer but not the ultimate decisionmakers and when those statements were not communicated to or known by the ultimate decisionmakers.

PARTIES TO THE PROCEEDINGS

Petitioner Watergate at Landmark Condominium was defendant-appellant below. Respondent Equal Employment Opportunity Commission was plaintiff-appellee below.

RULE 29.1 STATEMENT

Petitioner is an unincorporated association which has no parent, subsidiary, or affiliated corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Watergate at Landmark Condominium respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at —— F.3d —— and is reported in the appendix hereto ("App.") at 1a. The memorandum opinion and judgment of the District Court is unreported but is reprinted at App. 14a.

JURISDICTION

Respondents brought suit in the District Court alleging jurisdiction under 28 U.S.C. §§ 1331, 1337, 1343 and 1345. After the jury returned a verdict for respondent, the petitioner noticed an appeal on May 28, 1993 under 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered on May 24, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 7(c) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(c), provides:

> (1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.
>
> (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such violation of this chapter, regardles of whether equitable relief is sought by any party in such action.

Rule 801(d)(2)(D) of the Federal Rules of Evidence provides, in relevant part:

> Statements which are not hearsay. A statement is not hearsay if—
>
> Admission by party-opponent. The statement is offered against a party and is . . . (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, ...

STATEMENT OF THE CASE

A. Factual Background

The basic facts relevant to this petition were accepted as true by the court below and therefore are not at issue. Petitioner Watergate at Landmark Condominium ("Watergate") is a large condominium complex located in Alexandria, Virginia. App. 2a. One of the amenities that Watergate provides for its residents is a Racquet Club facility. In 1976 Melvina Nozick ("Nozick") was hired as Director of the Racquet Club. Nozick performed certain part-time administrative duties and also served as the Racquet Club's tennis instructor.

In 1988, more than two years before the employment decision at issue in this case, Watergate's Recreation Committee, whose volunteer membership was comprised of residents of the condominium, decided that there was a need to reorganize the administrative structure of the Racquet Club. After numerous community meetings, the Recreation Committee recommended to Watergate's Board of Directors that significant changes should be made to the Racquet Club's administrative operational rules. However, at no time was there any recommendation to remove Nozick from her position as Director of the Racquet Club. App. 3a.

In January, 1990, after reviewing the Recreation Committee's recommendations, the Board of Directors decided that additional review of the matter was necessary before final action could be taken in reorganizing the Racquet Club. The Board of Directors established an Ad Hoc Committee which was charged with taking a closer look at the organizational structure of the Racquet Club. App. 3a. The Ad Hoc Committee eventually recommended changes for the management and operation of the Racquet Club, including the elimination of the position of Director and the creation of a full-time position of Manager. The position of tennis instructor was to be abolished. On

April 24, 1990, the Board of Directors approved the Ad Hoc Committee's recommendations. App. 4a.

The Board of Directors instructed Pertine Squires ("Squires"), the General Manager of the condominium complex, to assume the responsibility of screening, interviewing and selecting the new manager for the Racquet Club. App. 4a. Nozick requested, but was denied, a right of first refusal for the job. However, Squires encouraged Nozick to apply for the new position. That position was advertised publicly and most of the applications were screened-out because of factors relating to living accommodations and salary requirements.

The Board of Directors authorized Squires to set up a small committee to assist in the screening of the remaining candidates. A three-person committee was established, consisting of Squires, Victoria Paulson, a Watergate management employee, and David Cearnal ("Cearnal"), a Watergate resident who was chair of the Recreation Committee (and therefore automatically a member of the Ad Hoc Committee), and otherwise a volunteer in this employment process. App. 4a. This three-person committee interviewed three candidates, including Nozick. During the interview process, Nozick was told that the new manager could not give private tennis lessons or use the facilities at the Racquet Club consistent with the reorganization plan adopted by the Board of Directors. App. 4a. Nozick objected to this prohibition because she was a resident at the condominium and claimed that she was entitled to use the facilities because she was a resident. Nozick informed Squires that she (Nozick) was unwilling to accept the condition of employment that the new manager of the Racquet Club could not use the Club's facilities. App. 5a. Because of Nozick's unwillingness to accept this condition of employment, the job was offered to one of the other final applicants for the position who was younger than Nozick. This decision was made solely by Squires, who was the sole decisionmaker regarding the new position. App. 5a.

B. Litigation in the District Court

Nozick filed a complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging sex and age discrimination in connection with the employment decision for the new position of manager of the Racquet Club. After EEOC issued a finding of probable cause,[1] a complaint was filed by EEOC in the United States District Court for the Eastern District of Virginia alleging that Nozick had been discriminated against on the basis of her age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.* (1988).

On the first day of trial, EEOC advised the District Court that it intended to offer testimony of Boyd Clayton ("Clayton"), a former part-time employee at Watergate's Racquet Club. EEOC proffered that Clayton would testify that sometime in 1990 he overheard several conversations at the Racquet Club between Cearnal and two other residents during which Cearnal allegedly stated that Nozick was too old to serve as Director of the Racquet Club. App. 6a. EEOC conceded that there was no evidence that any decisionmaker was aware of any alleged age-related statements allegedly made by Cearnal. Because the District Court concluded that Cearnal's statements were not communicated to the decisionmaker in this employment action, the District Court sustained Watergate's objection to the introduction of this testimony. App. 7a.

Squires testified at trial that she was the person directly and solely responsible for making this employment decision and that age was not a motivating factor in making her decision. A majority of the members of the Board of Directors also testified that Nozick's age had nothing to do with this employment action. Cearnal also testified

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[1] EEOC found no probable cause to support Nozick's charge of sex discrimination.

that as far as he was aware, age was not a factor in this employment decision. On cross-examination, Cearnal testified that he never told anyone that he wanted a younger manager of the Racquet Club.

EEOC then requested, during its rebuttal case, that the District Court reconsider its earlier ruling regarding Clayton's testimony about the alleged statements made by Cearnal. EEOC now argued that Clayton's testimony was admissible to impeach the cross-examination testimony of Cearnal. Over Watergate's objection, the District Court reversed its earlier ruling. Clayton was permitted to testify that on several occasions he overheard conversations between Cearnal and other resident tennis players at the Racquet Club that made reference to Nozick's age. EEOC offered no evidence to show that Clayton told Watergate's management about these remarks.

The District Court, over Watergate's objection, also permitted EEOC to present to the jury during is rebuttal case the deposition testimony of Pamela Grimmett ("Grimmett"), who was another part-time employee at the Racquet Club. Grimmett testified that on one occasion she overheard a conversation among four or five unidentified people where it was said that "they were going to get somebody younger" for the club. App. 6a. On cross-examination, Grimmett believed that one of the people involved in this conversation was Jack Armistead, a Watergate resident and member of the Recreation Committee. However, Grimmett testified that she did not inform Watergate's management of these alleged conversations.

The jury returned a verdict for EEOC. The District Court denied Watergate's motion for judgment as a matter of law. The District Court issued a final judgment in the case on April 29, 1993, and awarded $226,755.00 in damages.[2]

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[2] Included in the District Court's judgment was a finding that Watergate's employment decision was "willful" and that Nozick

C. The Fourth Circuit Opinion

The Fourth Circuit began its analysis by recognizing that "[w]hile the Board exercised ultimate control, authority to make employment decisions for the condominium was delegated to [Squires]." App. 3a. Nevertheless, the court concluded that Cearnal and Armistead were "limited agents" and therefore their statements were non-hearsay admissions of a party-opponent under Rule 801 (d)(2)(D) of the Federal Rules of Evidence. App. 8a.

While recognizing that Cearnal and Armistead were not the ultimate decisionmakers in the Nozick employment action, the Fourth Circuit nevertheless found that "Cearnal was at all critical times a ubiquitous actor in the overall process that led eventually and inexorably to the decision to remove Nozick." App. 8a. The court cited Cearnal's role as chair of the Recreation Committee, a member of the Ad Hoc Committee, and a member of the three-person interview committee. *Id.* The court also stated that because Armistead was a member of the Recreation Committee, he also served as an agent for the Watergate Board of Directors, though the court conceded that Armistead had a "much less . . . dominant presence in the overall process." App. 9a.

In searching for a rationale for its decision, the Fourth Circuit stated that a resident-member committee of a condominium association must be considered an "agent" of the association when acting within the scope of that committee's delegated duties and powers. App. 11a. The court believed that such volunteer committees are critical to the process by which private condominium associations conduct affairs. In essence, the court ruled that volunteer resident condominium members, who are not "elected officials or employees of the association" and who do not have authority to make employment decisions, should be considered agents of the association who can bind the

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was entitled to receive liquidated damages pursuant to 29 U.S.C. § 626(b).

condominium in employment-related decisions. *Id.* Thus, the Fourth Circuit held that the District Court did not err in admitting the statements of Cearnal and Armistead as evidentiary support for EEOC's claim that Nozick was discriminated against on account of her age.[3]

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IGNORES PREVIOUS RULINGS OF THIS COURT.

This Court has decided several cases which discuss whether liability can attach when the alleged wrongful conduct is undertaken by someone who is not the final decisionmaker or official policymaker regarding the action under review. *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988); *Pembaur v. Cincinnati,* 475 U.S. 469 (1986). The collective principle of law from these three plurality decisions is clear—liability cannot be predicated upon the actions of someone who is not the ultimate decisionmaker or official policymaker with respect to the subject matter in question. The guidance provided by this Court on this issue was ignored by the Fourth Circuit when it decided the instant case.

In *Price Waterhouse,* this Court considered the burden of proof in a "mixed motives" employment discrimination case. A significant factor addressed by this Court in making its decision was what role the discriminatory conduct played in the ultimate decisionmaking process. This Court made it clear that there must be some "direct evidence" that the discriminatory conduct "played a part" or "influence[d] the decisionmaker" with respect to the employment decision under review, and that the discriminatory

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[3] The Fourth Circuit also affirmed the District Court's finding of willfulness on the part of Watergate in support of an award of liquidated damages for Nozick. App. 12a-13a. Watergate does not seek review in this Court of the finding of willfulness.

conduct was not something "outside the decisionmaking chain." 490 U.S. at 257 (Brennan, J., for plurality). This Court further stated that there must be proof of "discriminatory input into the decisional process" that the discriminatory conduct was "credited by . . . the decisionmakers", and that it was a "substantial factor in the decision." 490 U.S. at 272 (O'Connor, J., concurring).

In *Praprotnik*, the issue before this Court was whether a municipality could be held liable under 42 U.S.C. § 1983 where the alleged unconstitutional policy was furthered by the actions of those who did not have final policymaking authority. In ruling that the City of St. Louis could not be held liable for the adverse employment actions taken against an employee of an agency of the City, a plurality of this Court concluded that the conduct of the employee's supervisors which were not reviewed by higher officials and where the supervisor did not have final policymaking authority for the City was insufficient to support a finding of liability against the City. 485 U.S. at 129.

Similarly, in *Pembaur*, this Court said in another plurality decision that an "official policy" is one adopted by someone with "final authority to establish municipal policy with respect to the action ordered." 475 U.S. at 481. Thus, four Justices of this Court concluded in *Pembaur* that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." 475 U.S. at 483.

These three cases inexorably lead to the conclusion that this Court will not allow liability to turn on statements or actions of an individual who does not have ultimate authority to act for and bind the party against whom a claim is made. It is this principle of law that was ignored by the Fourth Circuit in the instant case.

Here, there was no evidence at trial that Cearnal or Armistead were ultimate decisionmakers regarding the Nozick employment action, and the Fourth Circuit acknowledge this fact in its opinion. Indeed, the Fourth Circuit recognized that Watergate's Board of Directors exercised "ultimate control" (App. 3a) and was the "ultimate decisionmaker" (App. 8a), leading to the conclusion that the statements of Cearnal and Armistead were "concededly not that of ultimate decisionmakers." App. 11a.

Moreover, EEOC conceded at trial that the alleged Cearnal and Armistead statements were not communicated to Squires or the Board of Directors who had the ultimate authority to decide this employment action. There was no evidence offered at trial to show that these alleged aged-biased statements were made during the time when the Nozick employment decision was under active consideration. The Fourth Circuit wholly failed to address the fact that both the purported statements allegedly occurred months before the Nozick employment decision was made. Indeed, these statements were supposedly made when both declarants were playing tennis—hardly the "decisionmaking chain" that this Court contemplated in *Price Waterhouse*. Nevertheless, the Fourth Circuit decided that because Cearnal and Armistead were "limited agents" of Watergate within the contemplation of Rule 801(d)(2)(D) of the Federal Rules of Evidence, these alleged statements could be used to hold Watergate liable for age discrimination. App. 8a.

In short, the Fourth Circuit ignored the principle of law that flows from this Court's trilogy of cases discussed above that to bind an employer, the actions challenged must be those of persons with final decisionmaking or official policymaking authority. This case presents this Court with an ideal opportunity to clarify [4] and strengthen this principle of law in employment discrimination cases.

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[4] The Second Circuit expressly recorded its uncertainty over how to interpret this Court's decision in *Price Waterhouse*. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2d Cir. 1992).

II. THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

The Fourth Circuit's decision has contributed to the sharp conflict that exists among the nine circuits that have addressed this issue in the last ten years. The Fourth Circuit held in this case that liability can be established when there is no direct evidence that the ultimate decisionmaker was aware of or took part in the alleged discriminatory conduct. A majority of the circuits hold to the contrary. There is a need for this Court to settle this conflict within the circuits.

The Fourth Circuit has now adopted the view of the Second Circuit announced in *Zaken v. Boerer,* 964 F.2d 1319 (2d Cir.), *cert. denied*, 113 S.Ct. 467 (1992). In *Zaken*, the Second Circuit permitted the jury to hear a statement by a sales representative who stated that the plaintiff was fired because she was pregnant, on the ground that the statement was an admission by a corporate agent under Rule 801(d)(2)(D) of the Federal Rules of Evidence. The court went on to conclude that the declarant had ostensible authority over and participated in the employment decisions under review. Thus, even though there was no finding that the declarant was an ultimate decisionmaker in the employment process, the court ruled that the statement was an admission of a party-opponent and thus not hearsay for the purpose of establishing liability. Therefore, the Second Circuit, and now the Fourth Circuit, take the view that it is immaterial whether allegedly discriminatory statements are made by or made known to the ultimate decisionmakers so long as the statements are made by some agent of the employer under Rule 801(d)(2)(D) of the Federal Rules of Evidence.

The First, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits hold to the contrary. These circuits adopt the principle discussed by this Court in *Price Waterhouse v. Hopkins* that employment discrimination liability can be established only if the alleged discriminatory con-

duct is undertaken by or made known to the ultimate decisionmakers in the employment process. For example, in *Gray v. New England Telephone and Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986), the First Circuit held that a statement about the plaintiff's age was inadmissible when there was "nothing in the record to indicate that the company or those responsible for discharging [the plaintiff] has the same belief or that they communicated them to [the ultimate decisionmaker]." 792 F.2d at 255. Similarly, the First Circuit held in *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990), that statements about the plaintiff's age were inadmissible because the declarant was no longer a decisionmaker when the decision to fire the plaintiff was made and, therefore, the statements bore no weight regarding the motive or reason for the employment decision. The court correctly noted that "[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case." *Id.* at 10.

In a case citing this Court's plurality decision in *Price Waterhouse*, the Third Circuit held in *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3rd Cir. 1992), that comments made by someone who was ostensibly a limited agent of the employer but made years before the employment action under review were inadmissible to support a finding of employment discrimination. The court stated that "[s]tray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporarily remote from the date of decision." *Id.* at 545. In the instant case, the stray tennis court statements of Cearnal and Armistead allegedly were made months before Squires made the decision to hire someone other than Nozick. These statements were not probative of why Nozick was not hired and they should have been inadmissible to prove age discrimination.

In *Guthrie v. Tifco Industries*, 941 F.2d 374 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1267 (1992), the Fifth

Circuit addressed the issue of whether age-related comments by someone who was retired and no longer in an employment decisionmaking role were admissible for the purpose of establishing age discrimination. The court ruled that because these statements were made years after the defendant had retired from employment, the alleged statements were "vague and remote in time" and that they were no more than "stray remarks" which were insufficient to establish discrimination. *Id.* at 379. Thus, discriminatory statements by someone who was once a limited agent but is no longer a decisionmaker cannot rise to the level of admissible evidence to support a finding of age discrimination.

In a case that is in sharp conflict with the instant case, the Sixth Circuit specifically held in *Hill v. Spiegel*, 708 F.2d 233 (6th Cir. 1983), that alleged discriminatory statements made by persons who were not decisionmakers could not be statements concerning a matter within the scope of their agency and thus were not statements that met the requirements of Rule 801(d)(2)(D) of the Federal Rules of Evidence. The Sixth Circuit's ruling in *Hill* is logically consistent and legally sound, and should have been followed by the Fourth Circuit.[5]

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[5] Indeed, with respect to its analysis of Rule 801(d)(2)(D), the Fourth Circuit seems to be in conflict with its own decision in *Precision Piping v. E.I. du Pont de Nemours*, 951 F.2d 613 (4th Cir. 1991). In *Precision Piping*, the Fourth Circuit affirmed the exclusion of statements made by employees regarding the reasons for terminating a business relationship. The court found that the declarants "had no actual authority to hire, fire, or suspend" the business partner, and therefore the statements were inadmissible because they were not made within the scope of the declarants' authority as required by Rule 801(d)(2)(D) of the Federal Rules of Evidence. *Id.* at 619. Here, EEOC conceded at trial that these alleged statements regarding Nozick's age were never communicated to the ultimate decisionmakers at Watergate, and the Fourth Circuit recognized that Cearnal and Armistead were not the ultimate decisionmakers in the Nozick employment decision. App. 10a. Thus, the statements of Cearnal and Armistead should not have been admis-

More recently, the Sixth Circuit held in *Chappell v. GTE Products Corporation*, 803 F.2d 261 (6th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), that age-biased statements by the employer's "agents" were inadmissible because "the statements were prejudicial, and [the plaintiff] did not prove that [the employer's] agents had specific authority to make the statements." *Id.* at 268 n.2. This is exactly the situation in the instant case. Thus, statements that are not made by the decisionmaker cannot be probative of the motives of the decisionmaker, and therefore are too abstract and remote to be admitted as evidence to prove age discrimination. This rule of law, which is logical and sound, was not adopted by the Fourth Circuit.[6]

The split that exists among the circuits on this question is reflected in several decisions from within the Seventh Circuit. In *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405 (7th Cir. 1984), one panel of the Seventh Circuit reversed a jury verdict finding age discrimination where it was determined that

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sible since they were made by people who were not agents of Watergate and the statements were not made within the scope of Cearnal's and Armistead's agency as required by Rule 801(d)(2)(D).

[6] Similarly, in *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the Sixth Circuit decided a case where the issue of agency was not specifically raised but where the alleged discriminatory statements were made by persons who were not the ultimate decisionmakers. The court held that the alleged discriminatory statements should have been excluded from evidence because the declarants played no part in the decision to fire the plaintiffs. The court also expressed concern that admission of the alleged discriminatory statements would confuse the jury, and thus their potential for creating prejudice outweighed their probative value under Rule 403 of the Federal Rules of Evidence. The court concluded that "[w]ith no other direct evidence of age discrimination . . . , the impact of the [declarants] would be great." *Id.* at 156. The Sixth Circuit has consistently followed this rule. *See, e.g., Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1025 (6th Cir.), *cert. denied*, 114 S.Ct. 175 (1993); *Gagné v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989).

the ultimate decisionmaker did not make the alleged discriminatory statement under review. Indeed, in the *La Montagne* case, there was some evidence to suggest that the discriminatory statements were communicated to the ultimate decisionmaker, but the court found that without direct evidence that the discriminatory statements influenced the decisionmaking process, these statements could not be the basis for a jury verdict of employment discrimination. Likewise, in *Williams v. Williams Electronics, Inc.*, 856 F.2d 920 (7th Cir. 1988), another panel of the Seventh Circuit sustained entry of summary judgment for the employer where it was determined that the "discriminatory comments were attributable to individuals who were not involved in the layoff decision." 856 F.2d at 925. Finally, in *Fortino v. Quasar, Co.*, 950 F.2d 389 (7th Cir. 1991), the Seventh Circuit reversed a finding of age discrimination when it was determined that the actions and comments by employees not involved in the discharge decision cannot provide a basis for charging other employees with discrimination.

A fourth panel of the Seventh Circuit reached a contrary result in *Jardien v. Winston Network, Inc.*, 888 F.2d 1151 (7th Cir. 1989). In *Jardien*, the plaintiff's immediate supervisor made several statements regarding the supervisor's preference for workers younger than the plaintiff. There was also testimony that the employment decisionmaker in the company generally acquiesced in the supervisor's viewpoint about employees. The Seventh Circuit affirmed a jury verdict in favor of the plaintiff based, in part, upon the supervisor's alleged discriminatory comments. The *Jardien* court said that since the company's senior vice president, who was the ultimate decisionmaker in the employment process, relied on the supervisor's input, the supervisor's statements regarding a preference for younger workers could be admitted to establish age discrimination. In its opinion, the court attempted to distinguish the earlier decisions in *Williams* and *La Montagne*. However, in the *Fortino* case dis-

cussed above, which was decided in 1991, the Seventh Circuit appears to have returned to the line of thinking originally announced in *Williams* and *La Montagne*. Nevertheless, a careful reading of these four decisions from the Seventh Circuit reflects the confusion and uncertainty that exists over this significant issue in employment discrimination litigation.

The Fourth Circuit decision here is also in direct conflict with two recent decisions from the Tenth Circuit. In *Cone v. Longmont United Hospital Association*, 14 F.3d 526 (10th Cir. 1994), individuals who were clearly agents of the employer were said to have made age-related comments about the plaintiff, such as the hospital "need[s] some new young blood," *id.* at 531, a comment remarkably similar to the statements allegedly made by Cearnal and Armistead at Watergate. Nevertheless, the Tenth Circuit unequivocally held that "age-related comments by non-decisionmakers are not material in showing the [employer's] action was based on age discrimination." *Id.* The court went on to say that "no evidence has been presented to show a connection between this phrase and a discriminatory motive in terminating [the plaintiff]." *Id.* In fact, in *Cone* the Tenth Circuit cited a Fourth Circuit case, *E.E.O.C. v. Clay Printing Co.*, 955 F.2d 936 (4th Cir. 1992), in support of the view that there must be a demonstrable nexus between the alleged discriminatory statement and the decision to terminate the plaintiff. That nexus cannot be found in the instant case.

In the other decision from the Tenth Circuit, *Palochko v. Manville Corp.*, 21 F.3d 981 (10th Cir. 1994), the court held that remarks by someone other than the plaintiff's supervisor were insufficient to support a finding of age discrimination because the declarant was not "the supervisor who was charged with reducing the work force of the unit wherein [the plaintiff] was working." *Id.* at 982.

Finally, the Eleventh Circuit has followed the majority view that statements by nondecisionmakers are inadmissible to support a finding of employment discrimination. In *Mauter v. Hardy Corp.*, 825 F.2d 1554 (11th Cir. 1987), the court affirmed a summary judgment for the employer where the declarant's allegedly discriminatory statements were made by someone who played no role in the decision to terminate the plaintiff. The court cited the Seventh Circuit in *La Montagne* in support of its finding of no liability on the part of the employer.

These decisions demonstrate that there is a critical need for this Court to articulate a clear standard on the issue of whether liability in an employment discrimination case may be based on statements made by individuals who may be limited agents of the employer but not the ultimate decisionmakers, or when the discriminatory statements are not communicated to the ultimate decisionmakers. Three circuits—the Eighth, Ninth, and District of Columbia Circuits—have yet to squarely address this issue. This case contains no dispute over the material facts and thus presents this Court with an excellent opportunity to finally set forth a uniform rule of law on this important issue.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

Thousands of employment decisions are made every day in this country which have great impact on the rights and liabilities of employers and employees. Litigation involving federal employment discrimination laws is on the increase.[7] The 1991 Amendments to Title VII of the

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[7] For the year ending March 31, 1994, there were 14,351 employment law cases filed in the district courts. This is a 22.4% increase over the previous twelve months. *See* Administrative Office of the U.S. Courts, *Federal Judicial Workload Statistics Report* (March, 1994), at Table C-2A.

Civil Rights Act of 1964, Pub. L. 102-166, 105 Stat. 1071, may result in an increased number of lawsuits concerning alleged discriminatory employment decisions.

The importance of the issue of whether there can be a finding of liability in an employment discrimination case when the discriminatory conduct was not performed by or made known to the ultimate decisionmakers has surfaced in no fewer than nine circuits within the past ten years. During this ten year period there has been no majority decision from this Court regarding this issue. The Fourth Circuit has now injected more confusion into the plethora of employment discrimination litigation. By conceding that Cearnal and Armistead were not the ultimate decisionmakers in the employment process involving Nozick, yet holding that Watergate would still be liable under the ADEA, the Fourth Circuit blurred the distinction between persons who may be limited agents of an employer under the strict requirements of the Federal Rules of Evidence and those individuals and policymaking bodies which have ultimate employment decisionmaking responsibility for employers.

The increased uncertainty now generated by the Fourth Circuit regarding this issue calls for this Court to clarify and strengthen its expressions in *Price Waterhouse, Praprotnik* and *Pembaur*. This Court should make clear that discriminatory statements, to be probative and admissible, must be made by or made known to the decisionmakers or policymakers who have ultimate authority to make employment decisions. This threshold issue surfaces in many employment discrimination cases, and the three circuits which have not addressed this question and the district courts need to know how to decide this question in future litigation. This case turns on legal principles; there is no dispute about the facts. To be sure, this case presents this Court with an excellent opportunity to address and settle this significant issue in employment discrimination law.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-1723

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

WATERGATE AT LANDMARK CONDOMINIUM,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., Senior District Judge
(CA-92-1224-A)

Argued: February 9, 1994

Decided: May 24, 1994

Before PHILLIPS and MURNAGHAN, Circuit Judges, and YOUNG, Senior United States District Judge for the District of Maryland, sitting by designation.

OPINION

PHILLIPS, Circuit Judge:

The Equal Employment Opportunity Commission (EEOC) brought an action against Watergate at Landmark Condominium (Watergate) alleging that Watergate discharged a 63 year-old employee, Melvina Nozick, on the basis of her age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (ADEA). A jury found that Watergate had violated the ADEA, and that the violation was "willful" thus warranting the award of liquidated damages under the statute's section 7(b). On this appeal, Watergate challenges the sufficiency of the evidence to support the jury's finding of willfulness and the district court's admission of evidence of remarks demonstrating age bias made by two condominium residents. We affirm.

I

In 1976, Melvina Nozick was hired by the then recently opened Watergate, a condominium association in Alexandria, Virginia. Wategate is a large complex, consisting of 1,400 units housing approximately 3,500 residents.[1]

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[1] "The major characteristics of a condominium are individual ownership of a unit or apartment; an undivided interest in certain designated common elements that serve all the units in the condominium; and an agreement among the unit owners regulating the administration and maintenance of the property." Warren Freedman and Jonathan B. Alter *The Law of Condominia and Property Owners' Associations* 21 (1992). Condominiums function as private residential governments with the unit owners electing a board of directors to conduct the entity's business and social affairs. "However, since the directors who make the rules are elected by the owners, tyrannical directors can be voted out of office." Jesse Dukeminier *Property* 965 (2d ed. 1985). Which is to say that a condominium's board of directors must be responsive to resident wishes, in the same way that corporate directors must ultimately be responsive to shareholder wishes, and elected public officials to their electoral constituency's wishes.

Nozick was hired by Watergate to establish a racquet sports program; she was named Director of its tennis facilities, known as the Racquet Club, and served as the Tennis Professional. In 1989, while still holding those positions, she became a resident of Watergate.

During that same year, 1989, Watergate's Recreation Committee, in conjunction with an ad hoc Tennis Committee, decided that the Racquet Club needed to be "reorganized" and "rejuvinated". Both committees were small, volunteer committees comprised of Watergate resident unit owners (residents). David Cearnal was Chairman of the Recreation Committee and a member of the Tennis Committee. The committees' decision followed a survey of Watergate residents that revealed a concern by some that having the same person serve as manager of the Racquet Club and as tennis pro caused a conflict of interest with respect to the scheduling of court time by the pro for lessons at times when residents may have wanted to use the courts for their own play.

In January 1990, Cearnal, on behalf of the Recreation Committee, proposed to Watergate's Board of Directors (the Board) that the Racquet Club be recognized. Management of Watergate was entrusted to the Board; like the Recreation Committee, the Board was comprised of resident volunteers. While the Board exercised ultimate control, authority to make employment decisions for the condominium was delegated to a general manager, a position held at all relevant times by Petrine Squires. Unlike the Board members, the general manager was neither a resident nor a volunteer, but rather a paid employee of Watergate. The Board also functioned through various volunteer residents' committees; among these committees was the Recreation Committee.

Instead of acting directly on Cearnal's reorganization proposal, the Board chose to establish an ad hoc Reorganization Committee. In addition to being Recreation Committee Chairman, Cearnal was also appointed to the

Reorganization Committee. After several months, the Reorganization Committee reported back to the Board. In April 1990, based on the Committee's recommendations, the Board decided to separate Nozick's dual role as manager and tennis pro, and establish a "new" job which would be exclusively managerial. Nozick made clear that she was willing to forego her role as tennis pro, and the concomitant income, in order to continue as manager of the Racquet Club.

Because the Board considered the manager's job a "new" position, it denied Nozick a right of first refusal. However, neither the Board, nor Watergate manager Squires could identify a single job duty or responsibility to be performed by the holder of the "new" position which Nozick had not already been performing. Once the Board decided that Nozick would not automatically continue as manager of the Club after the reorganization, responsibility for deciding who would fill the position fell to Squires. She in turn delegated the initial winnowing process to another Watergate employee, Vicky Paulson, the complex's Activities Director. From 30 or 40 applications, a group of three candidates was culled: Nozick, then 63 years of age; Christina Moore, age 23; and Suzanne Rutt, age 28.

During late August, the finalists were interviewed by a three-person Interview Committee consisting of Manager Squires, Activities Director Paulson, and David Cearnal who, as indicated, was the Chairman of the Recreation Committee, a member of the Reorganization Committee, and the sole resident on the Interview Committee.

The interviewers rated each of the candidates. Nozick received the highest scores from both Paulson and Squires, and the highest overall rating. Cearnal rated Nozick last. During her interview, Nozick was told that the new Manager would not be able to give private lessons, or to use the facilities at the Club. There was evidence pre-

sented at trial that other candidates were not informed of these rules. Nozick was told that these prohibitions would apply to her even though she was a resident of Watergate. When Nozick protested, Squires said she would check with the Board and report back to her. After the interview, but before a decision was made, Nozick and Paulson and Squires discussed salary. Squires had budgeted $25,000 for the position, an amount which suited Nozick. Subsequently, Paulson asked Nozick if she would accept $24,000. Nozick consented. Finally Nozick was asked if she would take $22,000. Nozick again consented.

On August 25, 1990, Nozick wrote Squires a letter informing her that although she was willing to forgo using the tennis facilities for teaching purposes, she did want to "reserve the right to use the facilities on a personal basis on my *own* time." J.A. 309.

On August 28, 1990, the Board voted not to permit the Racquet Club manager to use the facilities.[2] Squires asked Paulson to inform Nozick of the Board's decision. Nozick, who at the time was in New York City attending the National Tennis Conference, had left with Squires two phone numbers where she could be reached. Paulson placed two calls, both of them to wrong numbers.

On August 30, Squires offered the manager's job to the 23 year-old Christina Moore. After initially accepting the job, Moore declined upon learning that she would not be able to use the courts on her own time. Upon Moore's resignation, Squires decided to offer Paulson, age 41, the position, at a salary of $24,000. Before doing so, she did not inquire whether Nozick would accept the job with the restrictions. Paulson accepted the position. On September 30, 1990, Nozick was terminated.

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[2] Members of the Board were then aware that this prohibition would specifically impact Nozick and that it was contrary to their previous decision to allow her to become a resident with no strings attached.

Nozick then filed an age and gender discrimination complaint with the appropriate EEOC Human Rights Office, and, in due course, the EEOC commenced this action against Watergate based solely on a claim of age discrimination.

At the ensuring jury trial, the EEOC was allowed to introduce, over Watergate's hearsay objection, evidence of statements made by Cearnal, while Chairman of the Recreation Committee, and by Jack Armistead, a member of that Committee, concerning Nozick's age. Specifically, two Watergate employees, receptionists Boyd Clayton and Pamela Grimmett, were allowed to testify, Clayton by live testimony at trial, Grimmett by deposition, to statements by Cearnal and Armistead that the witnesses claimed to have overheard. Clayton testified that he heard Cearnal, on more than ten occasions between February and August, 1990, say to other Watergate residents, including William Volmer, then Chair of the Ad Hoc Tennis Committee, that "they wanted someone younger for a manager of the racket (sic) club," and that "Mrs. Nozick didn't fit their idea of someone that was young." J.A. 190. Grimmett testified by deposition that she overheard Armistead say to other Watergate residents, just a few months before Nozick was passed over, that "they were going to get somebody younger in there [the Racquet Club] to work." J.A. 274.

Following a two-day trial, the jury found that Watergate had discriminated against Nozick on the basis of her age, and that the resulting violation of the ADEA had been willful. On that basis, it awarded her back pay as monetary relief, and the district court awarded her an equal amount as liquidated damages because of the finding of willfulness.

This appeal followed. On it Watergate raises two issues:

"1. Whether the District Court committed reversible error by admitting the hearsay statements of age bias of

individuals who were not decisionmakers in the employment action under review.

2. Whether there was sufficient evidence to support a finding that [Watergate] willfully violated the [ADEA]."

We discuss these in turn.

II

As indicated, the stated basis of Watergate's objections in the district court to the admission of the Cearnal and Armistead statements and its challenge to their admission on this appeal, is only that they were "inadmissible hearsay." [3] The EEOC counters, principally, that the statements were, per Rule 801(d)(2)(D), admissions of a party opponent which, under Rule 801 are "not hearsay," hence were admissible as such; or, alternatively, that they were admissible in any event under Rule 803(3) as statements concerning the declarant's "state of mind," or, "alternatively, as to Cearnal's statements, that they were admissible to impeach his in-court testimony that he had made no such statements.

Because we agree that the statements were admissible under Rule 801(d)(2)(D) as non-hearsay admissions of

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[3] The objection was first made in a motion in limine, filed by Watergate on the morning of trial, on the stated basis that the expected testimony would be "hearsay and inadmissible." J.A. 17. Following a hearing on that motion, the district court orally sustained the objection on the basis that if, as was assumed, the statements were not expressed to management, the evidence would be "irrelevant." J.A. 18. The district court, however, later reconsidered the matter upon the EEOC's renewed proffer of the evidence at trial following the close of Watergate's case. At that point, the court ruled orally that the evidence of Cearnal's statements might now be admissible to impeach his testimony on direct examination that he had never made any statements respecting Nozick's age in connection with the matters at issue, J.A. 188, and that in view of other trial evidence that had now disclosed the extent of both Cearnal's and Armistead's roles in the employment decision, the statements of both should now be admitted as substantive evidence on the dispositive motivational issue. J.A. 188-89.

a party-opponent, we address only that as a proper basis for the district court's ruling.

Rule 801(d)(2)(D) provides in pertinent part that

> —a statement is not hearsay if—[it] is offered against a party and is . . . a statement by the party's agent . . . concerning a matter within the scope of the agency . . . , made during the existence of the relationship.

The Cearnal and Armistead statements were therefore not excludable as hearsay—the sole basis of Watergate's objection—if at the time they were made these two men were "agents" of Watergate and if the statements concerned a matter within the scope of their agency.

The evidence clearly establishes that at the time these statements were made, both men were indeed "agents" of Watergate. Not, to be sure, general agents, but certainly agents for the limited purpose of assisting the Watergate legal entity, a condominium association, make decisions concerning its recreational program. This was a task that had as its central problem the organizational structure of the condominium's Racquet Club, a problem that came to include the subsidiary one of just who should occupy the position, however it might be styled in any reorganization, that Nozick then occupied.

As indicated in our recitation of the facts of record, Cearnal in particular and Armistead to a lesser extent were significantly involved in assisting Watergate's Board of Directors, the ultimate decisionmaker, in arriving at and implementing the solution to those problems. Cearnal was at all critical times a ubiquitous actor in the overall process that led eventually and inexorably to the decision to remove Nozick: Chairman of the Recreation Committee which first proposed the need for reorganization of the Racquet Club; then member of the Reorganization Committee appointed to consider the reorganization proposal that as Chairman of the Recreation Committee he had laid before the Board of Directors; and,

in the most critical stage, the only resident member of the three-person Interview Committee that was then appointed to interview and make recommendations respecting candidates for the "new" position of "Manager" of the Racquet Club that had emerged from the reorganization. Armistead, though much less a dominant presence in the overall process, was at the time of the statement attributed to him, a resident member of the Recreation Committee which originally came up with the proposal for reorganization of the Racquet Club in large part because of resident concern about Nozick's performance as its Director.

Watergate contends that even so, neither of these men was, within contemplation of Rule 801(d)(2)(D), an "agent" of Watergate whose statements concerned "a matter within the scope of [their] agency." Specifically, the point is urged that they were neither officials nor employees of Watergate, but merely resident members of the association serving as volunteers on committees whose function in the matters at issue was purely advisory to the Board of Directors, which alone had the ultimate decision-making authority in those matters. In support of this contention, Watergate relies on two lines of cases, neither of which, upon inspection, provides the support claim for it. One line involves decisions holding that particular statements suggesting age or gender bias (or other motive for challenged action)—whose admissibility in evidence was not in issue—were not sufficient, because of their stray or vague character or the complete noninvolvement of their maker in the relevant decisional process, to prove the claimed discrimination or to withstand summary judgment.[4] These decisions ob-

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[4] *E.g., Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990) (statements revealing "biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case"); *Guthrie v. Tifco Industries*, 941 F.2d 374, 379 (5th Cir. 1991) (statements that are "vague and remote in time and administrative hierarchy . . .

viously are inapposite to the instant case where the issue is precisely the admissibility of such statements and Watergate has not challenged the sufficiency of the statements to prove the discriminatory motive alleged.

The other line of cases does involve decisions directly concerning the admissibility of particular statements suggesting bias (or other motivational state of mind) of the maker and holding them inadmissible (or affirming inadmissibility rulings) because of the maker's noinvolvement in the relevant decisionmaking process. Some rest decision on the basis that the statements were thereby revealed to be irrelevant to the issue of bias in that process, some on the basis that maker's complete noninvolvement in the matter at issue negated any finding of his agency in the matter so that the statements were inadmissible hearsay rather than party admissions under Rule 801(d)(2)(D).[5]

All of the cases in this latter line are distinguishable from the instant case in the critical feature—whether

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are insufficient to establish discrimination"); *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 925 (7th Cir. 1988) (statements of "individuals who were not involved in the layoff process" insufficient); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438-39 (9th Cir. 1990) ("stray" remarks, even of employer, insufficient to prove discrimination); *Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987) (statements by one who "played no part in the decision . . . too attenuated to present a genuine issue of material fact").

[5] *E.g., Precision Piping & Instruments, Inc. v. E. I. du Pont de Nemours & Co.*, 951 F.2d 613, 619-20 (4th Cir. 1991) (statements concerning bias of another were not within scope of declarant's agency, hence hearsay); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 236-37 (6th Cir. 1983) (inadmissible hearsay where "no evidence that [makers of statements] had *any* involvement in the decision") (emphasis supplied); *Fortino v. Quasar Co.*, 950 F.2d 389, 395 (7th Cir. 1991) (statement of one who had no role in the discharge "had no probative value and, being prejudicial, was inadmissible"); *Garrett v. Lujan*, 799 F. Supp. 198, 201 (D.D.C. 1992) (statement by unidentified person inadmissible as hearsay because unclear "whether the person . . . was involved in the selection process").

they rest inadmissibility on lack of relevance or lack of agency to qualify as party admission—that the statements' makers had literally no involvement in the decisional process. That, as the record here plainly demonstrates, cannot be said of either Cearnal or Armistead, whose involvement in the process here was palpable, though concededly not that of ultimate decisionmakers. Significant involvement, either as advisor or other participant in a process leading to a challenged decision, may suffice to establish "agency" for this purpose; it is not necessary that the declarant be the actual final decisionmaker. *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 488 (4th Cir. 1982) (employees involved in implementing challenged policy); *Nekolny v. Painter*, 653 P.2d 1164, 1171-72 (7th Cir. 1981) (statements of "advisor" who had participated in interviews and made recommendation to final decisionmaker); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 874-76 (11th Cir. 1985) (statements of official who made "employee evaluations and suggestions for rehiring" to another who made actual decision).

In the private governmental structure of condominium associations such as Watergate, *see* note 1 *supra*, the resident-members of various standing and ad hoc committees to which the governing Board of Directors has delegated specified duties and powers—whether of decision, or merely of study, advice, or recommendation—must be considered, for the purpose here at issue, "agents" of the association when acting within the scope of their respective committees' delegated duteis and powers. Such committees, though staffed by "volunteers" from among its residents and not by elected officials or employees of the association, are critical, as certainly were Watergate's committees here, in the process by which this kind of private association of property owners conducts its affairs, including the making of personnel decisions.

As the district court rightly saw when all the evidence was in, the involvement of these two men as committee members in the decisional process leading to Nozick's

termination was sufficient to establish them as agents of Watergate for the 801(d)(2)(D) purposes here at issue. The court therefore did not err in admitting, as admissions of a party-opponent, evidence of their overheard statements respecting Nozick's age as a consideration affecting her continued employment.

III

We next consider Watergate's challenge to the district court's denial of its post-verdict motion for judgment as a matter of law with respect to the jury's finding that its violation of the ADEA was willful. Assessing the evidence under the appropriate standard, which requires that it be assessed in the light most favorable to Nozick, with the credibility of all that is favorable assumed, and the most favorable possible inferences drawn from it, *see, Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 243 & n. 14 (4th Cir. 1982), the evidence clearly sufficed to support the finding.

The substantive test of "willfulness" in the ADEA context recently was clarified by the Supreme Court in *Hazen Paper Co. v. Biggins,* 507 U.S. ——, 113 S. Ct. 1701 (1993). There, the Court distinguished between the employer who "incorrectly but in good faith and nonrecklessly believes that the [ADEA] permits a particular age-based decision" and the employer who pretends that a decision was not age-based when in fact it was. 113 S.Ct. at 1709-10. Alfthough the employer in the first instance may be in violation of the ADEA, such a violation is not "willful," but in the second instance, where age is shown to have been "an undisclosed factor motivating the employer", *id.* at 1709, a "willful finding is supported. As the Court further explained, to prove an ADEA violation "willful", "the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather

than a determinative factor in the employment decision." *Id.* at 1710.

Under this substantive test of willfulness, the evidence here clearly sufficed, assessed in the most favorable light to Nozick, to support the jury's finding of "willfulness". As in *Hazen,* the defendant here (Watergate) denied that age was a factor in its decision to fire the plaintiff-employee. The jury, presented with the properly admitted statements of Cearnal and Armistead suggesting otherwise and faced with Watergate's failure to offer any other credible explanation for Nozick's firing, had sufficient evidence before it to find the violation a "willful" one.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 92-1224-A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

WATERGATE AT LANDMARK CONDOMINIUM,
Defendant.

MEMORANDUM OPINION

Following the jury verdict in plaintiff's favor, there was presented the issue of an injunction or front pay to be awarded as equitable relief. The parties agreed that this was not a jury issue, and both parties also agreed that reinstatement as not a viable option. Accordingly, the issue for the court is what amount of front pay should be allowed.

The plaintiff argues for a figure of $93,011.00 [1] which is a calculation based on what Melvina Nozick would have received in pay and benefits had she worked to age seventy, reduced to present value. The defndant argues that, rather than the salary of Paulson, the person who obtained the position which the jury found to have been discriminatorily denied to Ms. Nozick, an initial salary of $22,000.00 should be used because at one point Ms.

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[1] This is less than the figure shown on PX 14, prepared by the plaintiff's expert.

Nozick indicated she would accept that salary if she obtained the position. The defendant also argues that it is speculative to assume that Ms. Nozick would work until age seventy. She testified she intended to work until that age.

The jury used the Paulson salary, $24,759.00, to reach its back pay award, and the court finds it is the proper starting point for the front pay calculation. It is the pay that was given for the job that the jury has determined should have been given to Ms. Nozick. It is equitable that Ms. Nozick receive the same. Nor is it speculative that Ms. Nozick would work until age seventy. It was the defendant's position at trial that the job was primarily managerial and did not include giving tennis lessons. While it might be argued that giving tennis lessons until age seventy is speculative—and there is no evidence in the record that one's ability to teach tennis rather than engage in competitive tennis diminishes as one approaches seventy—it is certainly not speculative that one could conduct managerial tasks until that age. That she could find other employment at her age is speculative, particularly in light of her unsuccessful attempt to seek employment since 1990.

The court finds that the figure of $93,011.00 is the appropriate front pay figure. To this will be added attorney's fees of $6,104.00, which the defendant does not contest.

The prayer for an injunction requiring the posting of notices to employees is denied. No necessity for such relief has been shown. This action involves a single act of discrimination. No evidence of a practice by the defendant of discrimination is present.

/s/ A. V. B.
United States District Judge

Alexandria, Virginia
April 29th, 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 92-1224-A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

WATERGATE AT LANDMARK CONDOMINIUM,
Defendant.

ORDER

Pursuant to the jury verdict, for the reasons set forth in the Memorandum Opinion this day entered and for the reasons stated from the bench in ruling on the defendant's motions after the verdict, it is ORDERED that:

1. The motion of the defendant for judgment as a matter of law as to the jury's verdict which found discrimination and wilfulness is denied.

2. Judgment is awarded in favor of the plaintiff, Equal Employment Opportunity Commission, against the defendant, Watergate at Landmark Condominium, in the amount of $226,755.00, which represents the jury verdict of $63,820.00, doubled to $127,640.00, plus front pay in the amount of $93,011.00, plus $6,104.00 in attorney's fees. Costs are also awarded.

/s/ A. V. B.
United States District Judge

Alexandria, Virginia
April 29th, 1993

(2)

No. 94-15

Supreme Court, U.S.
FILED
AUG 31 1994
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

WATERGATE AT LANDMARK CONDOMINIUM, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JAMES R. NEELY, JR.
Deputy General Counsel
GWENDOLYN YOUNG REAMS
Associate General Counsel
VINCENT J. BLACKWOOD
Assistant General Counsel
SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

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QUESTION PRESENTED

Whether statements showing age-based bias made by the employer's agents who participated in and influenced the employment decision were properly admitted at trial of claims under the Age Discrimination in Employment Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-15

WATERGATE AT LANDMARK CONDOMINIUM, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 24 F.3d 635. The opinion of the district court (Pet. App. 14a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1994. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a condominium complex located in Alexandria, Virginia. The complex is managed by a volunteer Board of Directors made up of unit owners. The Board delegated authority to make employment decisions to petitioner's General Manager. The Board also functions through various committees that address particular areas of condominium life. In 1989, the Recreation Committee decided that petitioner's Racquet Club needed to be "reorganized" and "rejuvenated," and the Board, acting on that recommendation, established a Reorganization Committee. Pet. App. 2a-3a. The ensuing reorganization resulted in the discharge of 63-year-old Melvina Nozick, who had been Director of the Racquet Club since it opened in 1976. *Id.* at 6a. The Equal Employment Opportunity Commission (EEOC) challenged that discharge as age-based in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*

There was direct evidence at trial that David Cearnal, a member of both the Reorganization Committee and the three-person interview committee that selected Nozick's replacement, sought to discharge her because of her age. He testified: "I know for a fact that she [Nozick] is not what the residents want. This is not what we went through the reorganization—you know, you have got to resolve that so we can achieve the objectives of what the reorganization was all about." 4/28/93 Tr. 237-238. Between February and August of 1990, Cearnal repeatedly said that he wanted "someone younger for a manager of the racket [sic] club," and that "Mrs. Nozick didn't fit their idea of someone that was young." Pet. App. 6a; C.A. App. 190-191, 193. The remarks about seeking a younger person were overheard by Boyd

Clayton, then a receptionist at the Racquet Club. The district court allowed Clayton to testify over petitioner's hearsay objection because Cearnal acted as an agent of petitioner in the challenged employment decision. C.A. App. 187-188.

Other evidence of age-related comments included statements by Jack Armistead, a member of the Recreation Committee, William Volmer, chairman of the Tennis Committee, and Nicholas Jabinsky, a resident tennis player. Racquet Club receptionist Pamela Grimmett testified that on May 5, 1990, Jack Armistead told her that Nozick "would be leaving" and that "they were going to get somebody younger in there to work." C.A. App. 274-278. Clayton testified that he heard Volmer and Jabinsky tell Cearnal that they "would also like to see someone younger" as Director of the Racquet Club. *Id.* at 192. Based on Armistead's role on the Recreation Committee, the district court held that he, too, was a limited agent, and overruled petitioner's objection to his statements. *Id.* at 188-189. Petitioner did not object to the testimony regarding Volmer and Jabinsky. *Id.* at 192.

Other circumstances surrounding Nozick's discharge also supported the claim that the decision was discriminatory. The Reorganization Committee, seeking to "rejuvenate" the Racquet Club, recommended that Nozick's Director job be divided into two positions: Manager and tennis professional. Nozick expressed her willingness to give up her role as tennis professional in order to continue as Manager. Pet. App. 4a. The tennis professional duties had been relatively minor, amounting to only four hours per week in 1990, C.A. App. 47, and the duties of the new Manager position were otherwise identical to those Nozick had performed as Director. Pet. App. 4a. Nonetheless, the Board denied Nozick the

right of first refusal to the "new" manager position, and advertised it as a job vacancy. *Ibid.*; C.A. App. 111-112.

Nozick applied for the Manager position. The three top applicants included Nozick and two substantially younger candidates. Pet. App. 4a. An interview committee comprised of Cearnal and two of petitioner's paid staff, General Manager Petrine Squires and the Activities Director, Vicky Paulson, interviewed the three candidates. *Ibid*; C.A. App. 117. The interviewers rated each candidate, and Nozick received the highest score from two of the interviewers, and the highest overall rating. Pet. App. 4a; C.A. App. 487-495. Cearnal, however, ranked Nozick last. Pet. App. 4a; C.A. App. 496.

During the interview, Nozick was told that, as manager, she would not be able to give private lessons or make personal use of the tennis courts. Pet. App. 4a-5a. The other candidates were not informed of any such restrictions. *Ibid.*; C.A. App. 88-90; 4/28/93 Tr. 137-138. Nozick protested that, as a resident of the condominium who paid fees for the privilege of using the facilities, including the Racquet Club, she should be able to play tennis there on her own time. Pet. App. 5a; C.A. App. 38-39. Squires said she would check into the matter. Pet. App. 5a. Nozick then wrote Squires a letter explaining that she would not teach on the courts or otherwise use them during work hours, but did want to reserve the right to play there on her own time. *Ibid.*

On August 28, 1990, while Nozick was out of town at the National Tennis Conference, the Board voted not to permit the Racquet Club Manager to use the facilities even on her own time. The Board was then aware that Nozick was the only one of the three candidates who was also a resident of the complex, so that extension of the prohibition to the Manager's own time would deprive her alone of existing privileges. Pet. App. 5a n.2; C.A. App.

175. On August 30, 1990, without determining whether Nozick would accept the additional restriction, Squires offered the job to 23-year-old Christina Moore. Pet. App. 5a. On September 30, 1990, Nozick was discharged. *Ibid.*

Nozick was, however, asked to orient Moore to the job. C.A. App. 44-45. When Moore expressed her eagerness to use the courts after work, Nozick informed her of her understanding that the Manager could not use the facilities, and recommended that she check with management. *Id.* at 45. When management, faced with an embarrassing inconsistency, stated that a restriction on court use also applied to Moore, she resigned. *Id.* at 89-90; Pet. App. 5a. The job was then offered not to Nozick, but to 41-year-old Paulson, petitioner's Activities Director, who had not interviewed for the position. Pet. App. 5a.

Petitioner never inquired whether Nozick would forgo personal use of the Racquet Club, even though the General Manager acknowledged that Nozick was the most qualified candidate, and asserted that she would have been offered the job had she been willing to accept the restriction. C.A. App. 131-132. Paulson was hired at a yearly salary close to $25,000, after Squires had asked Nozick if she would accept $22,000. Pet. App. 5a; C.A. App. 287.

On February 7, 1991, Nozick filed a discrimination claim with the Equal Employment Opportunity Commission. PX 1, C.A. App. 292-293. The EEOC conducted an investigation, and determined that petitioner had discharged Nozick based on her age in violation of the ADEA. PX 3, C.A. App. 294-296.

Following a two-day jury trial, the jury found that petitioner had discriminated against Nozick based on her age, and that it had done so willfully. Pet. App. 6a. The jury awarded back pay, and the court awarded an equal

amount in liquidated damages, as required by the ADEA in cases of willful discrimination. *Ibid.* The court also awarded front pay and attorneys' fees, and denied the respondent's requested injunction. *Id.* at 14a-15a.

2. The court of appeals affirmed. Pet. App. 1a-13a. It held that the statements of Cearnal and Armistead were properly admitted in evidence as non-hearsay admissions of a party opponent under Federal Rule of Evidence 801(d)(2)(D). Pet. App. 7a-12a. Both declarants were limited agents of petitioner, the court held, because they each "were significantly involved in assisting [petitioner's] Board of Directors" to reorganize the Racquet Club and change its staff. Cearnal was "at all critical times a ubiquitous actor in the overall process that led eventually and inexorably to the decision to remove Nozick," *Id.* at 8a, and he was "the only resident member of the three-person Interview Committee" in the "most critical stage" of that process. *Id.* at 9a. Armistead was a resident member of the Recreation Committee that first expressed "resident concern about Nozick's performance as [Racquet Club] Director," and provided the initial impetus behind the reorganization. *Ibid.*[1]

The court of appeals also upheld the jury's determination that petitioner's ADEA violation was willful, entitling Nozick to liquidated damages. The court contrasted an employer's erroneous but good-faith conclusion that an age-based decision was lawful with that of an employer who acts willfully by "pretend[ing]

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[1] Because the court of appeals held the Cearnal and Armistead statements admissible under Federal Rule of Evidence 801(d)(2)(D), it did not address respondent's alternative contentions that the statements were admissible for impeachment or to reveal the declarants' state of mind. Pet. App. 7a-8a.

that a decision was not age-based when in fact it was." Pet. App. 12a, citing *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1709-1710 (1993). "[T]he evidence here clearly sufficed" under this standard. Pet. App. 13a. Although petitioner denied that the decision was age-based, "[t]he jury, presented with the properly admitted statements of Cearnal and Armistead suggesting otherwise and faced with [petitioner's] failure to offer any other credible explanation for Nozick's firing, had sufficient evidence before it to find the violation a 'willful' one." *Ibid.*

ARGUMENT

Petitioner asserts that liability under the Age Discrimination in Employment Act cannot be "based on allegedly discriminatory statements of persons who are limited agents of the employer but not the ultimate decisionmakers * * * when those statements were not communicated to or known by the ultimate decisionmakers." Pet. i. The court of appeals held, however, that the jury's verdict was fully supported by competent evidence. That decision is correct and does not conflict with any decision of any other court of appeals.

1. Petitioner now acknowledges that David Cearnal and Jack Armistead were petitioner's limited agents for purposes of the disputed employment decision. Pet. i. Petitioner thus abandons the only ground upon which it challenged the liability determination on appeal. See Pet. C.A. Br. 17-28. Petitioner also expressly "does not seek review in this Court of the finding of willfulness." Pet. 8 n.3. This concession alone suffices to render immaterial any challenge to the sufficiency of the evidence, or to the admission of particular statements showing age-based intent. In all events, the evidence amply supported the jury verdict. Indeed, petitioner

admitted as much in the court of appeals, where it challenged the admission of the Cearnal and Armistead statements under Federal Rule of Evidence 801(d)(2)(D), but did "not challenge[] the sufficiency of the statements to prove the discriminatory motive alleged." Pet. App. 10a.

2. Contrary to petitioner's suggestion, see Pet. i, 8, 17, there is no requirement under the ADEA that a jury verdict be supported by direct evidence of the motive of the ultimate decisionmakers. Circumstantial evidence alone is enough to support a jury finding of intentional discrimination. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742, 2749 & n.4 (1993). Direct evidence of discriminatory motives on the part of an employer's agents, although not required, is admissible and highly probative. *Ibid.*; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).[2]

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[2] Petitioner's contention that *Price Waterhouse* requires "direct evidence" of discrimination by the ultimate decisionmaker, Pet. 8-9, is incorrect. This Court held that the discriminatory statements in *Price Waterhouse* were sufficient to establish that gender had been a motivating cause of the decision, notwithstanding that the vast majority of the statements at issue there were made by individuals other than the ultimate decisionmakers. 490 U.S. at 257 (plurality opinion) (considering biased comments that "were made by 'persons outside the decisionmaking chain'" because to do otherwise would "ignore[] the critical role that partners' comments played in the Policy Board's partnership decisions"); *id.* at 272 (O'Connor, J, concurring in the judgment) (noting that statements properly "given 'great weight' by the decisionmakers" were not made by the decisionmakers themselves). Moreover, the principal holding of *Price Waterhouse* regarding burdens of proof in "mixed

The jury verdict in this case was fully supported by the record. The court of appeals correctly held that the statements of Cearnal and Armistead were probative of petitioner's motives, and were admissible.[3] Contrary to petitioner's suggestion, the jury verdict did not rest on those statements alone. The evidence also included comments by Reorganization Committee member and Tennis Committee chairman William Volmer that he would like to see "someone younger" in charge of the Racquet Club. The jury properly could have concluded that these participants brought illegal motives to bear directly on the process, for example in recommending the abolition of Nozick's job and, in Cearnal's case, in rating her unfavorably as a candidate. The active involvement of all of these individuals in the events leading up to Nozick's discharge, together with the other evidence of record, also could have supported an inference that their motives were in fact known to and taken into account by the General Manager or the Board when the final decision was made.

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motive" cases is inapplicable to this case, which was never litigated by either party as a case involving a combination of legitimate and illegitimate motives.

[3] See, *e.g.*, *EEOC* v. *Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994) (holding age-related remarks probative and admissible in ADEA suit even though supervisor who made remarks did not make discharge decision); *Zaken* v. *Boerer*, 964 F.2d 1319, 1323 (2d Cir.) (holding remarks reflecting discriminatory motive for discharge probative and admissible where declarant was not final decisionmaker but "took part in personnel decisions regarding hiring and firing"), cert. denied, 113 S. Ct. 467 (1992); *Jardien* v. *Winston Network, Inc.*, 888 F.2d 1151, 1155 (7th Cir. 1989) (holding age-related remarks by non-decisionmaker admissible because "a jury could reasonably conclude that [decisionmaker] accepted [declarant's] input" in making discharge decision).

Moreover, petitioner's assertion that it did not hire Nozick in the "new" Manager job only because she refused to accept restrictions on her use of Club facilities on her own time, Pet. 4, was patently pretextual. The Board knew when it adopted the restriction that it affected only Nozick, who was the only candidate who was also a resident and therefore otherwise entitled to Club privileges. Although Nozick was warned of the restriction early in the interview process and ostensibly not offered the job because of it, the other, younger candidates testified that they were never informed during interviews of any such restriction. Most importantly, Nozick was never even asked whether she would have accepted it. The procedural irregularity of offering the position to Vicky Paulson, who had not been interviewed, provided additional support for an inference of unlawful motive. See generally *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (noting that "[d]epartures from the normal procedural sequence" may be evidence of illegal motive).

Petitioner's contention that "liability cannot be predicated upon the actions of someone who is not the ultimate decisionmaker or official policymaker with respect to the subject matter in question," Pet. 8, relies on erroneous application to an ADEA claim of legal standards unique to claims under 42 U.S.C. 1983. "[A] local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents." *Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). Only if injury is inflicted by persons whose conduct amounts to a municipality's "official policy" can the government entity be liable under Section 1983 for damages. Decisions by persons who are "ultimate decisionmakers" with respect to challenged

conduct are deemed under Section 1983 to be "official policy." See, *e.g.*, *Pembaur* v. *Cincinnati*, 475 U.S. 469 (1986). The question who is the "ultimate decision-maker" on "official policy" is, however, a concern limited to suits against municipalities for damages under Section 1983. It has no significance under the ADEA, where liability may be based on the conduct of an employer's agents. 29 U.S.C. 630(b)(1). Petitioner's reliance on *Pembaur* and *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), Pet. 8-10, 18, is thus misplaced.

3. There is no circuit conflict on the issues presented by the petition; the court of appeals correctly distinguished the assertedly conflicting decisions upon which petitioner relies. Pet. App. 9a-11a. Several of those decisions held that particular statements suggesting bias, the admissibility of which was not contested, "were not sufficient, because of their stray or vague character or the complete noninvolvement of their maker in the relevant decisional process, to prove the claimed discrimination or to withstand summary judgment." *Id.* at 9a. Other decisions petitioner cites held that statements suggesting bias were inadmissible because of the declarant's "noninvolvement in the relevant decisionmaking process." *Id.* at 10a. None of those cases employs an evidentiary standard which, if applied to this case, would have required a result contrary to the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
Attorney
Equal Employment Opportunity Commission

AUGUST 1994

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Supreme Court of the United States
OCTOBER TERM, 1994

WATERGATE AT LANDMARK CONDOMINIUM,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER

The brief in opposition ("Opp. Br.") filed by respondent EEOC fails to address the compelling reasons put forward by petitioner Watergate at Landmark Condominium ("Watergate") why this Court should review the decision of the court below.[1] Instead of directly responding to the issue of whether a judgment under the Age Discrimination in Employment Act can rest on the stray remarks of individuals who are not ultimate decision-makers in the employment action under review, EEOC

[1] Watergate respectfully refers the Court to its Petition for Writ of Certiorari for its Rule 29.1 Statement. Pet. for Cert. at ii.

devotes most of its brief in opposition to a recitation of the facts which are not in dispute between the parties and are not dispositive of the question of law presented by this case. It remains true that the Fourth Circuit's decision is based on stray comments made by two individuals recognized by the Fourth Circuit not to be the ultimate decisionmakers in this case. Pet. App. 8a. The Fourth Circuit's decision is contrary to a majority of the circuits that have addressed this question. The frequency with which this issue is raised in employment discrimination cases calls for a clear and uniform rule of law from this Court.

1. EEOC wants this Court to believe that this case involves only a question of sufficiency of the evidence. Opp. Br. at 7-8. Yet, EEOC fails to remind this Court that it conceded at trial—and the Fourth Circuit apparently accepted as true—the fact that the random and isolated alleged age-based comments of David Cearnal and Jack Armistead were never communicated to the ultimate decisionmakers of this employment action. Equally significant is that nowhere in its brief in opposition does EEOC confront a critical element in this case—one again recognized by the Fourth Circuit—that Cearnal and Armistead were not the ultimate decisionmakers in the Nozick employment action. Pet. App. 8a. It is telling that EEOC does not cite a single case in its brief in opposition that would support a vedict under the ADEA which is based on stray comments by non-decisionmakers. To the contrary, in its petition Watergate cited numerous cases which stand for the proposition that ADEA verdicts cannot flow from evidence of stray comments by non-decisionmakers or comments that are not communicated to the ultimate decisionmakers.

2. EEOC relegates to a footnote its attempt to blunt the impact that this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), has on the question presented by this case. Opp. Br. at 8 n.2. At the least,

Price Waterhouse calls for some evidence of discrimination that is "credited by . . . the decisionmakers," and that played a "substantial factor in the decision." 490 U.S. at 272 (O'Connor, J., concurring). The plurality opinion in *Price Waterhouse* demands at least some nexus between comments or actions of non-decisionmakers and the employment decision under review. EEOC fails to address this point in its discussion of *Price Waterhouse*. Opp. Br. at 8 n.2. To be sure, this case presents this Court with an excellent opportunity to clarify and strengthen the sound principle of law announced in the plurality decision in *Price Waterhouse*.

EEOC also fails to appreciate the collective principle of law that flows from this Court's decisions in *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), and *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), that liability in employment cases must be predicated on the actions of someone who is an official policymaker or ultimate decisionmaker. EEOC cannot dismiss these cases by merely suggesting that they are "a concern limited to suits against municipalities." Opp. Br. at 11. To say that liability under the ADEA is different because it can be based on the conduct of an employer's agents misses the point. Those agents must be individuals who carry the imprimatur of authority to act, and not be isolated individuals who, while technically defined as limited agents under the rules of evidence, make stray comments remote in both time and place to the employment decision under review.

3. EEOC also refuses to acknowledge in its brief in opposition the sharp conflict which exists among the circuits on the issue of whether an ADEA judgment can be based on comments by non-decisionmakers. Indeed, it is significant that EEOC does not even make the attempt to distinguish a single case cited in the petition that portrays the conflict that currently exists beween the Second and Fourth Circuits, on the one hand, and the First, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits,

on the other hand. This conflict is real, recurring, and in need of resolution.

The only new case not previously addressed by the parties raised by EEOC in its brief in opposition is *EEOC v. Manville Sales Corp.*, 27 F.3d 1089 (5th Cir. 1994). Opp. Br. at 9 n.3. The *Manville* decision can be distinguished from the instant case on its facts. In *Manville*, the negative age remarks at issue were made by the employee's direct supervisor who was the decisionmaker-in-fact of the employment action under review.[2] That is not the situation here. Neither Cearnal nor Armistead had any employment authority at Watergate. To be sure, EEOC strains credulity to suggest that stray comments made on a tennis court months before the employment decision in question can be the basis for a finding of liability. In short, the *Manville* case does not present this Court with a reason why the petition should be denied.

The brief in opposition falls woefully short of addressing the several compelling reasons why this case should be reviewed by this Court. There is a need to tie together this Court's decisions in *Price Waterhouse, Praprotnik*, and *Pembaur* into a uniform, clear, majority holding that sets forth the logical rule of law that employment discrimination liability, if based on comments and remarks about the employee, must be a reflection of the true motive of the ultimate decisionmakers regarding the employment action under review. At the least, any stray remarks must be communicated to the ultimate decisionmakers for the comments to have any probative value to show that the decision was motivated by a discriminatory purpose. Moreover, the conflict that exists among the

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[2] The decision in *Manville* does not change the long-standing rule in the Fifth Circuit that the conduct and remarks of persons without authority to hire or fire are not relevant to an ADEA charge. *See Fowler v. Carrollton Public Library*, 799 F.2d 976, 984 (5th Cir. 1986). *See also* Pet. for Cert. at 12-13.

circuits—and even within one circuit [3]—independently justifies review of this case by this Court. Finally, the number of times this issue arises in federal employment litigation is notable, and the federal courts should have a clear rule of law to follow for future cases.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

WILLIAM F. CAUSEY *
SCOTT ALTON MILLS
JACKSON & CAMPBELL, P.C.
1120 - 20th Street, N.W.
South Tower
Washington, D.C. 20036-3437
(202) 457-6732
Counsel for Petitioner

* Counsel of Record

[3] *See* Pet. for Cert. at 14-16 for a discussion of the conflict that exists within the Seventh Circuit on this issue.